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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF FLORIDA,

Petitioner,

vs.

CLARK A. CAPLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

---

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QUESTIONS PRESENTED FOR REVIEW

I

IS THE MERE OBSERVATION OF HAND-ROLLED CIGARETTES, STANDING ALONE, SUFFICIENT TO ESTABLISH PROBABLE CAUSE?

II

DOES THE DRIVER OF A MOTOR VEHICLE INVOLVED IN AN AUTOMOBILE ACCIDENT GIVE CUSTODY OF HIS VEHICLE TO AN INVESTIGATING OFFICER SIMPLY BY REQUESTING ASSISTANCE IN OBTAINING A TOW TRUCK TO THE EXTENT THAT AN INVENTORY SEARCH IS LEGALLY PERMISSABLE AND IS THIS A SUBSTANTIAL FEDERAL QUESTION?

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STATEMENT OF THE CASE

The Petitioner's Statement of the Case is substantially accurate and is accepted by the Respondent. However, two areas warrant clarification or additional exposition.

First, Caplan asked Officer Roberts for the name of a towing service and, upon getting a name, asked Roberts to call the service on his behalf (Pet. App. A-3). Caplan never asked Roberts to have it towed nor did he authorize Roberts to do anything other than contact a towing service. He never gave custody of the vehicle to Roberts (Pet. App. A-8).

Second, while Officer Roberts had seen marijuana cigarettes in the past, he also testified that he could not see what was inside these particular cigarettes and that he had also seen hand-rolled tobacco cigarettes in the past (Pet. App. A-15; A-30, 31, 32).

REASONS TO DENY THE WRIT

I

THE OPINION OF THE FLORIDA SUPREME COURT THAT THE MERE OBSERVATION OF HAND-ROLLED CIGARETTES IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH WAS PROPER AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS.

The Petitioner claims that the opinion of the Florida Supreme Court was improper and in conflict with decisions of this Court and certain other jurisdictions. That position is only supported by an expansive interpretation of the holding below which is neither indicated by the opinion itself nor by previous opinions on the same issue by the Florida Supreme Court.

A. Holding Below

The Florida Supreme Court opinion sought to be reviewed (Petitioner's App.-A2) does not establish any new standards, rules of

law, or interpretations of existing case law. It merely reaffirmed its earlier opinion in P.L.R. v. State, 455 So.2d 363 (Fla., 1984), cert. den. 469 U.S. 1220 (1985) and applied the holding and analysis of P.L.R. v. State, supra. to the facts of the present case.

In P.L.R. v. State, supra., the Florida Supreme Court held that the mere observation of an opaque container, standing alone, was insufficient to establish probable cause for a warrantless search or seizure. It ruled that some additional objective factor must be present. There, the additional factors were (1) that the seizing officer testified he had never seen such containers (manila envelopes) hold anything other than contraband at the particular location involved, and (2) the location involved was a known narcotics transaction site. Thus, the Court ruled that probable cause existed and permitted the search.

In the instant case, the Court simply applied the same standards as previously discussed in P.L.R. v. State, supra. The police officer in this case saw several hand-rolled, partially burned cigarette wrapping papers on the floorboard of an automobile which had been involved in a two car accident. He saw no other evidence of contraband, could not see what was inside the cigarette papers, and the location was not at a known narcotics transaction site (it was in front of the police station). He testified that the objects looked like hand-rolled tobacco cigarettes or marijuana cigarettes but did not give any testimony as to how he could tell the two apart. Thus, the observation of the cigarette papers was unsupplemented by any other factors. The Court held only that under these antiseptic facts probable cause to search was not present.

The Petitioner asserts that the opinion

below requires a police officer to be absolutely certain of the contents of an opaque container before probable cause would exist (Pet. at 17). That interpretation of the holding below is just plain wrong. Indeed, in P.L.R. v. State, supra., the Florida Supreme Court upheld a warrantless search under the plain view doctrine without such certainty but upon the facts as stated above. The Florida Supreme Court has ruled only, and narrowly, that in determining probable cause, a "hunch" as to what is inside an opaque container is insufficient and that at least one additional, objective factor must be present.

B. Test to Determine Probable Cause

When seizing an item in "plain view", this Court has stated that there is no invasion of privacy when probable cause exists that the item in question is related in some manner

to criminal activity. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Thus, the issue presented to the Florida Supreme Court was whether the observation of hand-rolled cigarettes, without more, was sufficient to establish probable cause.

"Probable cause" has been described by this Court as "a flexible, common-sense standard" which requires only that a police officer view all the facts available to him to determine whether a reasonably cautious person would consider that the item probably is or contains contraband or evidence of a crime. Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). In the context of a search warrant, this Court has held that probable cause is the determination of whether all the circumstances viewed in a practical, common-sense manner give rise to a probability that the property to be searched

contains evidence of crime. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 257 (1983).

In this case, the Florida Supreme Court did not fail or refuse to apply the appropriate test for probable cause as discussed in the aforecited cases. The opinion sought to be reviewed did not establish a new or different standard to determine probable cause. It applied a common-sense approach to viewing the totality of circumstances and held only that the mere observation of a hand-rolled cigarette by a police officer who knew such objects could contain either marijuana or tobacco, standing alone with a total lack of other salient facts, was insufficient to establish probable cause. That ruling was proper and in accord with the standards set forth by this Court.

C. **Lack of Conflict**

The Respondent disputes the claim that conflict exists between jurisdictions and, instead, asserts that the opinion below is in harmony with the decisions cited by the Petitioner.

First, and foremost, the Petitioner claims that the underlying decision is in conflict with this Court's holding in Texas v. Brown, supra. There, this Court upheld the warrantless seizure of an opaque balloon which a police officer believed contained narcotics. The Court noted that the balloon was uninflated, tied-off near the tip in a certain manner, and that the officer also observed small plastic vials and white powder in the glove compartment. Furthermore, there was evidence that tied-off balloons were a common container for narcotics and, importantly, there was no evidence of

> "any innocent item that is commonly carried in uninflated,

> tied-off balloons such as the one...seized." (concurring opinion of Powell at 460 U.S. 745).

This opinion is in full accord with that of the Florida Supreme Court. Indeed, faced with the facts of Texas v. Brown, supra., the rationale of the Florida Supreme Court would also lead to the finding of probable cause. There was more than the mere observation of an opaque container. There was observation of vials and a white powdery substance. There was the condition of the balloon being uninflated but tied-off nevertheless. There was the testimony that narcotics were frequently carried in this manner and no evidence or suggestion as to what type of innocent, legal item was carried in such a manner. The requirement of the Florida Supreme Court of at least one additional objective factor beyond mere observation of an opaque container was met several times over. Additionally, the discussion of these

factors in Texas v. Brown, supra. in the plurality and concurring opinions gives weight to the importance of considering all the circumstances in determining the existence of probable cause. These two cases are in harmony.

Next, the Petitioner claims that State v. Calhoun, 502 So.2d 808 (Ala. 1986), conflicts with the underlying decision of the Florida Supreme Court (Pet. at 18). There, the police had information from a reliable confidential informant that Mr. Calhoun and another man would be going to a certain area on a particular night with the express purpose of purchasing marijuana. The police verified certain facts, and, after seeing Mr. Calhoun and his friend drive to the indicated area on the night in question, later made contact with him. A police officer with experience in the detection of narcotics saw two hand-rolled cigarettes in Calhoun's shirt pocket.

The Alabama Supreme Court held that those circumstances were sufficient to establish probable cause to seize the cigarettes.

Again, there was more than just the observation of the hand rolled cigarettes. There was the additional factor of the information received from the previously reliable confidential informant that Calhoun and a friend were specifically going to purchase marijuana that evening. The Alabama Supreme Court held that the information received by the police that Calhoun would be seeking to purchase marijuana that evening along with certain corroborating evidence gave the police reasonable suspicion to stop Calhoun and his friend. This, coupled with the sight of what appeared to be marijuana cigarettes justified the search and brought it to the level of probable cause. This, too, is consistent with the ruling of the Florida Supreme Court since there was the

additional, objective factor of the informant's tip.

Finally, the Petitioner cites several cases at intermediate State appellate levels (Pet. at 19) and one Federal District Court case (Pet. at 18) which it claims are in conflict with the holding below. Of course, none of these cases fall within the parameters of consideration which this Court has set forth in Rule 17, Supreme Court Rules. Nevertheless, each of them, save one, has additional factors beyond the mere observation of hand-rolled cigarettes which entered into the Court's decisions.

In Johnson v. State, 720 S.W.2d 293 (Tex.App. 1986), the police officer observed a pack of factory made tobacco cigarettes next to the hand-rolled cigarette. In Commonwealth v. Skea, 18 Mass.App. 685, 470 N.E.2d 385 (1984), the police officer observed several one-quarter inch long smoked, hand-

rolled marijuana cigarette butts known as "roaches" in the same vicinity as the hand-rolled cigarette in question.

In State v. Kennedy, 107 Wash.2d 1, 726 P.2d 445 (1986), the police received information from a previously reliable confidential informant that Kennedy regularly purchased marijuana at a particular location. Additionally, the police received citizen complaints of suspicious activity at that same location. After verifying certain of the information, the police stopped Kennedy who made a furtive gesture as if secreting something under the front seat. The Court ruled that all of these factors taken together were sufficient to establish probable cause to search a bag found under the front seat.

In State v. Marchand, 37 Wash.App.741, 684 P.2d 1306 (1984), the police observed other drug related paraphernalia with the hand-rolled cigarette. In fact, the Court

there suggests that the hand-rolled cigarette alone may not have been sufficient to establish probable cause. See 684 P.2d 1310, (n.4). In State v. Knowles, 438 So.2d 648 (La.App.2d Cir., 1983), writ den. 442 So.2d 458 (La. 1983) the Court only applied a "reasonable suspicion" standard. Finally, United States v. Bravo, 403 F.Supp. 297 (S.D.N.Y., 1975) may in fact be in conflict with the decision sought to be reviewed although the opinion is unclear as to the reasons behind the police officer's belief he had probable cause.

The Petitioner curiously states that Florida has a particularly serious drug "problem" (Pet. at 21). While this may or may not be true, it raises the point that the determination of probable cause based on the totality of circumstances may vary from jurisdiction to jurisdiction. Indeed, the use of hand-rolled tobacco cigarettes is, no

doubt, much more prevalent in some areas of the country than in others. Local custom and usage of various types of objects and containers should certainly be a consideration in the determination of probable cause. Local jurisdictions should be free to apply the proper test to determine probable cause to the facts of each case which should be viewed and interpreted according to those local customs. This Court need not establish a uniform, nationwide finding that probable cause is or is not present under the facts of this case.

In summary, there is no disagreement among various jurisdictions as to the proper standards to be applied in the determination of probable cause. The Petitioner claims only that there is conflict in the application of the standard to the observation of opaque containers believed to contain contraband. However, despite this claim, no widespread

conflict exists. The two cases cited by the Petitioner which fall within the parameters of Rule 17, Supreme Court Rules would have resulted in similar holdings applying the doctrine of the Florida Supreme Court. This Court should not exercise its jurisdiction on the narrow facts and holding of the underlying opinion of the Florida Supreme Court.

II

THE HOLDING OF THE FLORIDA SUPREME COURT THAT AN INVENTORY SEARCH DID NOT TAKE PLACE WAS BASED ON A FACTUAL DETERMINATION AND DOES NOT RAISE A SUBSTANTIAL QUESTION OF FEDERAL LAW.

The Florida Supreme Court held, based upon the facts in the record, that an inventory search never took place. It concluded that the search of the automobile was conducted by the police officer because of his mistaken belief that he had probable cause to search. Additionally, the Court found that the police never had custody of the vehicle. Thus, since the police never had custody of the vehicle and the search was, in truth, conducted pursuant to a criminal investigation, there simply was no inventory search. Whether the vehicle in this case was ever lawfully in police custody does not raise a substantial question of Federal law. Therefore, this

Court is without jurisdiction. 28 U.S.C. §1257.

Had the Florida Supreme Court held that an inventory search was illegal under the circumstances herein, then a question of Federal law might have been involved. However, the ruling below was based entirely upon factual findings from the record. This Court should not take jurisdiction of a case which is based purely upon a finding of fact unless the factual finding is either so intermingled with a question of Federal law as to make it necessary to examine the factual finding or under circumstances where the factual finding has directly resulted in the denial of a Federal right. Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1198 (1927); Grayson v. Harris, 267 U.S. 352, 45 S.Ct. 317, 69 L.Ed. 652 (1925); Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963).

Here, the factual finding is unrelated to any Federal law. It has not resulted in the deprivation of any Federal right. This Court should not exercise jurisdiction to review the factual findings of the Florida Supreme Court.

The Petitioner has argued, nevertheless, that a conflict exists between the decision sought to be reviewed and decisions of this Court as well as the Supreme Court of Virginia. However, none of the cases cited by Petitioner deal with a non-arrested vehicle operator or owner who was present at the scene of the search. Here, the vehicle was involved in a common automobile accident at an intersection. The driver, Mr. Caplan, was on the scene. He asked for help in getting a tow truck to get his vehicle out of the intersection. He went into the police station on the corner to make a phone call. The Florida Supreme Court ruled that these facts

did not establish transfer of custody of the vehicle, even temporarily, to the police. That ruling, does not conflict in any manner with any of the cases cited by Petitioner. Therefore, even if this Court did have jurisdiction, there would be no particular reason for the Court to exercise its jurisdiction for the purpose of reviewing these facts.

CONCLUSION

The question of probable cause to search an opaque container has been recently addressed by the Florida Supreme Court. That decision does not conflict with the decisions of other juridictions and a significant conflict does not now exist across the Country.

The Florida Supreme Court held that the facts in the record established that an inventory search of an automobile did not take place. Therefore, no substantial federal question was involved in that issue.

For the foregoing reasons, the Respondent requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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